

FEBRUARY 24. 1769.

[Lord AUCHINLECK Reporter.]

*W^m Earl of Glencairn
& Pursuers*

CONDESCENDENCE

F O R

The Magistrates and Town Council of *Kilmarnock*, Defenders ;

AGAINST

WILLIAM Earl of *Glencairn*, and WILLIAM PATERSON Writer in *Kilmarnock*, Pursuers.

IT has been observed in the informations, that the town of *Kilmarnock* purchased for a valuable consideration, its freedom and liberty to chuse its own magistrates, which has been attended with happy effects, as from very small beginnings, it has now grown up to be a very flourishing community.

It will occur to your Lordships, that it is of the greatest consequence to every court to have a clerk of knowledge and ability, and, in particular, is of the last moment to a burgh of barony, as the clerk is the person who is the universal adviser in every point of doubt whether judicial or extrajudicial ; and it may well be believed, that if it had been proposed by Lord *Kilmarnock* that the town should have no right to chuse a clerk, they never would have entered into the transaction with him. The Earl made no such proposal, but agreed to their being erected into a free burgh of barony without any reservation ; and therefore, according to the principles of law stated in the defenders information, the magistrates had the right to chuse their clerk.

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The pursuers, sensible that the law stands against them, had recourse to an averment, that the Earl had been always in use to appoint the town-clerk, and the magistrates had never appointed any.

The answer made was, that though in fact the magistrates had always employed Lord *Kilmarnock's* man of business to officiate as their clerk, this was entirely owing to their particular regard for the persons whom they employed; and that, in fact, for many years, there was no other man of business in the place.

To take off this plea, the pursuers had recourse to another averment, viz. That the clerk's commission, as clerk, was recorded in the town-books; and in evidence thereof, they produced, for the first time, just when the cause was going to be advised, what they were pleased to call the town's book.

This production, at so late a period, was not a little surprising to the defenders; for, in the competition between the Earl of *Glencairn* and the present defenders, concerning the election of magistrates, when the affair of the clerkship was yet depending, Mr. *Paterfon*, one of the pursuers, had deposed and exhibited all the books which he knew of relative to these disputes; and as the book now produced was not among them, it is plain he did not consider it to be any of the town books, though it is now mustered up under that pretence.

The Lords having been pleased to remit to the Lord Ordinary to hear parties on this new production, his Lordship appointed mutual confidences to be given in. In obedience to which order, the following is humbly offered on the part of the magistrates of *Kilmarnock*.

After a careful inspection of this book, the defenders beg leave, with great submission, to contend, that it has not the least influence on the question, and this your Lordships will be satisfied of, when you are informed of the following particulars.

The book produced is not a record of the town-council, but a large book into which Mr. *Paterfon*, the Earl of *Kilmarnock's* man of business, and clerk of his baron court, inserted a number of transactions, sometimes of the baron baillie, sometimes of the town baillies, sometimes of the Earl of *Kilmarnock*, and sometimes of that Earl and all his baillies. this without any proper distinction; and it is in this book, that the commission to the clerk founded on by the pursuers is inserted, consequently, your Lordships

ships will observe, it cannot from thence be affirmed, that it is ingrossed in the council books.

Whereas it may be pleaded, that its being ingrossed in that book, was a sufficient notification to the magistrates of *Kilmarnock*, that the Earl claimed the right of putting in their clerk, and therefore they were called upon, if they had a mind, to challenge this. It is proper to observe, in point of fact, that as this book was constantly kept by the clerk, the magistrates had no opportunity to examine it; besides, though they had examined it, nothing was entered into it which could shew the Earl pretended to the privilege of naming a clerk to their courts; for the commission which he granted was such, as he had an undoubted power to grant after the transaction with the town, as well as before.—He was baron of the baronies of *Kilmarnock* and *Grougar*, and of the burgh of barony of *Kilmarnock*; and, by the transaction with that burgh, though he allowed a free election of magistrates, he reserved to himself and his heirs a cumulative jurisdiction with the magistrates of the burgh over the burgh; and therefore he, most properly and agreeably to his powers, appointed Mr. *Paterfon* to be his clerk of the baronies of *Kilmarnock* and *Grougar*, and of the burgh of barony of *Kilmarnock*: But he does not say, or insinuate, that Mr. *Paterfon* was, in virtue of that nomination, to officiate as clerk, not only in his Lordship's courts, but also, in the courts to be held by the magistrates; and that not only was he to have a salary from the Earl, but from the magistrates: Had it been so, the magistrates, however much attached to that noble family, which always did what it could to encourage the town, would doubtless have opposed it, from a just apprehension of the danger that might arise in after times from a bad precedent: But as no such thing was insinuated in the commission, the same being altogether such as the Earl was intitled to grant, they had no occasion to impugn it, and could have no suspicion, that their employing the clerk to the Earl's baron court to officiate in their courts could ever deprive them of a right clearly in them to chuse their own clerk.

And whereas it has been urged, that when the clerk's commission was recorded, one of the town baillies signs the minute along with the baillie of the barony and the Earl himself, that circumstance, with great submission, can have no sort of influence; for the minute does not bear, that his commission was to be clerk to the town council.

It is from thence obvious, that there was nothing which could make the town baillies suspect, that the intention was, to get him to acknowledge the Earl's right to name the clerk of the magistrates: So he could make no scruple to adhibit his subscription along with the noble Lord and his baillie; and indeed it is not believed, that Lord *Kilmarnock* had any view at that time of supplanting the town in so indirect a manner in a valuable privilege belonging to it.

This book may indeed be termed a *farrago* of irregularities, the Earl of *Kilmarnock* sits in judgment, and signs the decrees, which he had no right to do; posterior dates are interjected between the order, for recording *Robert Paterson's* commission in 1709 down to 1715; in short, it is humbly apprehended that it can afford no ground of argument.

And, therefore, as this very late production has, with submission, no sort of influence on the argument, the cause is just where it was, and is now to be determined on the same principles it would have been, the day after the agreement between Lord *Kilmarnock* and the inhabitants of *Kilmarnock*, by which he agreed to their having the election of their own magistrates, which, in the defenders information, has been shewn, implies a right to chuse their own clerk.

In respect whereof, &c.

JAMES BOSWELL.